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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 240

LOCAL 483, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS & HELPERS OF AMERICA, AFL–CIO, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

AND

STANDARD OIL COMPANY AND CENTRAL STATES PETROLEUM UNION, LOCAL 115, INTERVENORS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. A1–4) is reported at 288 F. 2d 166. The decision and order of the National Labor Relations Board (Pet. A6–16) are reported at 127 NLRB 223.

JURISDICTION

The court of appeals entered its judgment on March 2, 1961, and denied a petition for rehearing on March

22, 1961 (Pet. A4–5). On June 1, 1961, Mr. Chief Justice Warren entered an order extending to July 20, 1961, the time for filing a petition for certiorari. The petition for certiorari was filed on July 20, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Sections 8(a)(3) and 8(b)(2) of the National Labor Relations Act were violated by the denial to craft employees, who had been severed into a separate craft unit as the result of an NLRB representation proceeding, of job opportunities within an operation and maintenance unit to which their seniority had entitled them prior to their severance therefrom.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, appear at SA1–2 of the Petition.

STATEMENT

A. THE FACTS

1. *Introduction*

For many years prior to the events in this case, Central States Petroleum Union, Local 115 (herein called CSPU), had been the collective bargaining agent for a unit of operation and maintenance (O & M) employees at the Wood River, Illinois refinery of the Standard Oil Company (R. 7, 16–17; 47, 48).[1]

[1] "R" refers to the Joint Appendix filed in the court of appeals.

This unit consists of five divisions, one of which—the mechanical division—is subdivided into various departments including a department of boilermakers (R. 19; 47–48).

The workloads in the various departments and divisions fluctuate greatly, with the result that the number of employees permanently assigned to a particular work unit seldom coincides with the exact number of men needed at any one time (R. 19–20; 49). The problem of temporarily shifting employees from the departments and divisions where work is slack to those where work is available was resolved by agreement of the Company and CSPU upon a system of seniority and transfer rights. The agreement requires that, when a reduction of work occurs, the employees with the least seniority in the department or division affected shall be temporarily discontinued from the jobs they have been occupying. These employees, however, are not laid off, but are instead transferred to a labor pool which in turn furnishes such employees to other divisions or departments as needed. The right to reassignment out of the labor pool is governed by "plant seniority"—that is, the total time worked in the plant without reference to seniority in any particular department or division. Similarly, when a shortage of work within the plant results in an excess of employees within the labor pool, layoffs are made in inverse order of plant seniority (R. 8, 19–21; 49–52).

"Bumping" into the labor pool, and the consequential temporary assignments into other divisions or departments, does not interrupt the accumulation of

seniority within the work unit to which an employee is regularly assigned. Each employee who has been bumped back into the labor pool is entitled, under the agreement, to return to his own department (or division) when an opening develops, in accordance with his departmental seniority. During the period that an employee is working outside his own department or division he does not acquire departmental seniority in the unit where he is temporarily assigned, and he continues to exercise seniority rights within his own unit for such purposes as overtime work and vacation schedules. The agreement does not permit seniority other than plant seniority within the labor pool, which, as indicated, functions primarily as a clearing center for reassignment (R. 8, 19–23; 50–53).

A second facet of the seniority system is the right of employees under the contract to bid for permanent jobs outside their own regular work unit. Thus, if a permanent opening occurs, employees elsewhere in the O & M unit are entitled to bid for it, and departmental, divisional and plant seniority govern the selection of the successful bidder. Upon being transferred to the new department or division, the employee loses his seniority in his former work unit and is placed at the bottom of the seniority list at his new post, but his plant seniority remains unaffected (R. 8, 19–21; 55).

2. *The representation proceeding*

In October 1956, Local 483 of the Boilermakers filed with the Board a petition under Section 9(c) of the Act requesting that the employees in the Com-

pany's boilermaker department be given the opportunity to select it as their bargaining representative in a separate bargaining unit (R. 7, 17; 53, 118). On August 20, 1957, following hearing, the Board found that the boilermaker employees constituted a true craft group and were thus entitled to bargain separately from the O & M unit of which they had been a part, and directed an election to determine their wishes (R. 9; 118–126). In reaching its decision, the Board took into consideration the fact that boilermakers were bumped back to the labor pool when reductions of work occurred, but, finding that assignments from the labor pool were "temporary in nature, and are not considered a part of their routine duties," the Board concluded that this circumstance was not "a sufficient basis for denying craft severance to an otherwise true craft group" (R. 12; 122).

The election was held on September 19, 1957 (R. 9; 75). At that time 39 employees were carried on the seniority list of the boilermaker department, 22 of whom were currently working in the department and 17 of whom had been bumped back into the labor pool and were working at temporary jobs elsewhere in the plant (R. 9; 75–76; 126–127). All those working in the boilermaker department voted, casting 19 ballots for separate representation by Local 483 and 3 ballots for continued representation within the O & M unit by CSPU (R. 9; 126–127). Sixteen of the 17 employees who had been bumped back into the labor pool voted, but all of their ballots were challenged by the Company on the ground that, by virtue

of their temporary assignments, they were not in the boilermaker's unit (R. 9; 127). Both Local 483 and CSPU urged that these 16 ballots be counted (R. 129–131).

On November 6, 1957, the Board's Regional Director issued his report recommending that the challenged ballots be counted on the ground that the Board's direction of election contemplated that the craft unit include "all employees on the boilermaker seniority list" (R. 134). On April 2, 1958, the Board adopted the recommendations of the Regional Director and directed that the challenged ballots be opened (R. 10; 99). The final tally showed that 35 votes favored separate representation by Local 483, and 3 votes were cast for continued representation by CSPU with the existing O & M unit (R. 10; 144–145). On April 16, 1958, the Board certified Local 483 as the representative of the boilermaker employees (R. 10; 142–143).

3. *The refusal to apply the seniority provisions of the contract in the O & M unit to employees in the boilermaker unit*

Local 483's petition of October 1956, for a craft severance election was filed at a time when the Company and CSPU were beginning negotiations for a new contract to replace their existing agreement, which was to expire on December 27, 1956 (R. 7; 22). The pending question of craft severance raised by Local 483's petition became a matter of immediate and continuing concern to the Company and CSPU, both with respect to the treatment to be accorded the boilermaker employees in the pending contract negoti-

ations, and the application to them of the seniority arrangements in effect within the O & M unit. On November 12, 1956, the Company notified CSPU that in order "to maintain a position of neutrality" as to the craft severance question it was "immediately suspending all bargaining with [CSPU] on new working agreement provisions and wages affecting the [boilermaker] employees * * *." The Company added that it would continue to recognize CSPU for purposes of administering the existing contract with respect to the boilermaker employees, but would withdraw recognition as to such employees after the expiration of the agreement until the question of representation had been settled in the Board proceeding (R. 7; 58).

On May 3, 1957, the Company and CSPU executed a new collective bargaining contract covering the employees in the O & M unit, but specifically excluding the employees involved in the craft severance proceeding then pending before the Board (R. 7–8; 60). The new contract continued in effect the established seniority practices, and although the boilermaker employees were not covered by the contract, the Company and CSPU orally agreed that bumping privileges should be extended to the boilermaker employees until the representation question was settled (R. 8; 60–61). In addition, shortly after the execution of the contract, the Company announced that "in the interest of fair treatment and to avoid any possible feeling that the Company is discriminating against the employees involved in the representation proceeding," wage increases and working condition

changes reflected in the new contract would be extended to boilermaker employees (R. 62). The Company again explained that the exclusion of the boilermaker employees from the contract had been necessitated by "the Company's legal duty to refrain from recognizing any union as the exclusive bargaining representative of the employees in the boilermaker * * * [department] until the question of such representation is determined in accordance with N.L.R.B. proceeding" (*ibid.*). No arrangement was made, however, respecting the application to the boilermaker employees of the contract provisions for permanently transferring from one department into another (R. 8; 60–61).

Following the Board's Direction of Election on August 20, 1957, the question of the effect the election would have on the established seniority system came into prominence. On September 12, CSPU sent a letter to the boilermaker employees in which it explained (R. 67) that union contracts creating seniority rights can cover only the employees and the unit that the union is entitled to represent, and that, if the boilermaker department were constituted as a separate unit, boilermakers could no longer have the same rights in the labor pool as under the former CSPU contract.

The Company similarly expressed its concern over the same problem during a conference between the Board's representative and attorneys for Local 483 and CSPU on the eve . the election. The Company's attorney stated during the conference that in the Company's view it would be required to treat all employ-

ees who were permitted to vote in the craft severance election as members of the boilermaker unit in the event that the vote was for separate representation, and that the question of voting eligibility thus would govern whether boilermaker employees temporarily working out of the labor pool would be entitled to enjoy the seniority provisions of the contract covering the O & M unit (R. 73–74). In accordance with this position the Company challenged the ballots cast at the election by the boilermakers who had been bumped back into the pool. As the Company explained in its statement of position to the Regional Director respecting the challenges (R. 78):

> * * * [The Company] does not take any position with respect to the eligibility of the challenged voters. The purpose of the challenges was to obtain, through Board procedure, a ruling with respect to which bargaining unit each challenged voter belonged in the event a separate boilermaker bargaining unit resulted from the election. * * * Those challenged voters who are ruled eligible to vote, and necessarily therefore fall in the boilermaker bargaining unit, will have to be laid off because there simply is no boilermaker work available for such employees. * * *

Local 483 also filed a statement of position respecting the challenged ballots in which it urged that the boilermaker employees who had been bumped back into the labor pool were properly a part of and should be permitted to vote in the boilermaker unit (R. 76). Local 483 stressed that a work assignment resulting from

bumping back into the labor pool, "regardless of duration, is of a temporary nature" (R. 76).

In a further attempt to obtain determination of its legal obligations respecting the boilermaker employees following the election, the Company filed with the Board a motion for clarification of the Decision and Direction of Election. The motion requested that the Board more specifically define the boilermaker unit "and the authority of any labor organization certified to represent such unit so that it will be clear that such labor organization may bargain collectively only for employees in the boilermaker department * * * and not with respect to their employment in any other jobs at work. * * *" (R. 95). The motion was denied shortly before the Board overruled the challenges to the ballots of the boilermakers who had been bumped back into the labor pool (R. 135, 99).

In October and November, 1957, during the pendency of the foregoing matters before the Board, an employee in the boilermaker department who had been bumped back into the labor pool, E. C. Jones, attempted first to bid out of the boilermaker department and into the labor pool, for which there was no provision in the seniority system, and then to bid into another department. As stated above, the contract governing such bids then in effect in the O & M unit specifically excluded employees involved in the boilermaker craft severance proceeding, and Jones's bid was denied (R. 9; 107–108). In February 1958, four other boilermaker employees similarly situated with Jones attempted to bid into another department, and their bids were similarly denied (R. 9–10; 22;

107, 112–114). If the boilermaker employees had been covered by the O & M unit contract, the bids of four of the five employees, including Jones, would have been accepted (R. 114). CSPU expressed its opposition to such bidding attempts in a letter to the Company in connection with Jones's bid. The letter stated that the boilermaker employees had been deliberately excluded from the contract in order to avoid the commission of an unfair labor practice, and that they therefore could not properly invoke the provisions of the contract respecting departmental transfer (R. 110–111).

On April 17, 1958, the day following the issuance of the final tally of ballots and the certification of Local 483 as the bargaining representative of the separate boilermaker unit, the Company, in accordance with its understanding of its legal obligations, notified the 17 boilermaker employees then working out of the labor pool that they would be replaced by laid-off employees in the O & M unit who were covered by the seniority provisions of the contract with CSPU. The notification letter explained that (R. 105):

> Because of the recently concluded NLRB representation proceedings, in which you were involved as a member of the boilermaker group, you are expressly excluded from the agreement with CSPU, Local 115, and therefore have no seniority under such agreement. * * * Under the circumstances the company feels that it has no alternative to laying you off from non-boilermaker work to which others have contractual seniority rights.

CSPU had two days earlier sent the Company a letter stating that the Board's certification of the separate craft unit would bring to an end the oral understanding under which the boilermaker employees had been accorded bumping rights into the labor pool, and that it expected strict compliance thereafter with the seniority provisions of the contract, which excluded boilermaker employees from its coverage (R. 101–103).

B. THE BOARD'S CONCLUSIONS AND ORDER

Charges were filed with the Board alleging that the layoffs of the 17 boilermaker employees in the labor pool, and the denial of transfer bids by some of them, violated Sections 8(a)(3) and 8(b)(2) of the Act, in that such action discriminated against the employees because of their selection of Local 483 as their representative. The Board, overruling the Trial Examiner, concluded that the Company and the CSPU had not acted unlawfully. The Board found that the layoffs were attributable, not to the boilermaker employees' selection of a particular union, but rather to the fact that the seniority arrangement was only applicable to the O & M unit and the boilermaker employees (including those who were in the labor pool) had elected to leave that unit. In the Board's view, neither the Act nor the contract with CSPU required that the seniority agreement applicable to the O & M unit be extended to employees outside that unit. The Board further found that the denial of transfer bids to the boilermakers during the pendency of Local 483's representation petition

was consistent with the Company's obligation to maintain neutrality until the question as to which union was to represent the boilermakers had been resolved. Accordingly, the Board ordered the complaints against the Company and CSPU dismissed in their entirety. (Pet. A6–16.)

C. THE DECISION OF THE COURT OF APPEALS

The court below (Judges Phillips, Prettyman and Bazelon), in a *per curiam* opinion, upheld the Board's decision that the Company and the CSPU had not violated the Act. The court stated: "This case reflects the difficult situations which often arise when craft severance requires readjustment of a highly complex seniority system. We think the Board's resolution is a reasonable one and reflects a proper accommodation of the interests which the Act seeks to serve." (Pet. A4.)

ARGUMENT

The issues in this case concern the effect of a "craft severance" election on the complex "bidding," "bumping," and "labor pool" arrangements prevailing at the Wood River plant. Presenting no question of general importance in the administration of the Act, these issues were resolved by the Board in accordance with settled principles, not in conflict with the decisions of this Court or of any court of appeals.

1. The employees here involved were "junior" boilermakers who by virtue of their relative lack of seniority were working out of the labor pool rather than as boilermakers at the time of the election. Nevertheless, as petitioner Local 483 itself successfully

insisted before the Board, they were "boilermakers" qualified to vote in the election, which would determine whether the boilermakers continued to be part of the "O & M" unit, represented by CSPU, with the benefits of the "labor pool" and other aspects of the CSPU contract, or whether they would henceforth be represented by the petitioner, with whatever benefits petitioner as their bargaining representative might obtain for them. Having voted in favor of representation by Local 483 rather than by CSPU, the employees cannot complain because they lost the "labor pool" aspects of CSPU's contract, and, as boilermakers, were laid off, precisely as they would have been if the boilermakers had always been represented by a separate union and not been a part of the CSPU group.[2]

Nothing in *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768, or *National Labor Relations Board* v. *International Association of Machinists*, 279 F. 2d 761 (C.A. 9), certiorari denied, 364 U.S. 890, relied on by petitioners (Pet. 10–11), conflicts with this result. In the *Radio Officers* case, union members within the bargaining

[2] See Jones, *Self Determination vs. Stability of Labor Relations*, 58 Mich. L. Rev. (1960) 313, 335:

"Employers who believe that the craft employees have not gained from severance cite most often as the reason for their belief the loss in job security. Where severance has occurred, the craft workers have had their 'bumping' rights restricted to their particular units. In several instances, this had led to the layoff of skilled workers, whereas, formerly, they could have displaced workers in less skilled jobs."

unit received higher wages than non-members in the same unit. Nothing in the decision suggests that employees in different units must receive the same wages,[3] or must be able to "bump" from one unit to another. The *Howard* case held that a bargaining representative under the Railway Labor Act could not use its power to destroy the jobs of Negro porters in a unit represented by another union when the only motivation for the representative's action was the race of the employees. Nothing in the decision implies that the employees in the porters' unit had a right to jobs in the trainmen's unit in the event of a porter's layoff. In the *Machinists* case, employees who left the bargaining unit received differing treatment depending upon whether or not they exercised their statutory right to select a bargaining representative. In the instant case employees who left the unit represented by CSPU would have no right to a job in the "labor pool" serving that unit, whether they went to a boilermakers unit or to any other unit whether or not represented by a labor organization.

In short, the flaw in petitioner Local 483's position is that the labor pool rights it seeks were among the fruits of a contract applicable to members of the O & M unit. Having voted to leave that unit, the boilermaker employees voted themselves out of the labor pool, apparently preferring to forego the benefits of CSPU representation (including the labor pool) in favor of the benefits of representation by Local 483.

2. Realizing that its claim for labor pool rights must necessarily arise out of contract, Local 483 urges (Pet.

[3] See *Anheuser-Busch, Inc.*, 112 NLRB 686, 690.

11–12) that the Company violated the Act when it refused, after the petition for severance of the boilermakers was filed with the Board, to continue bargaining with the CSPU respecting the boilermaker employees and to include those employees in the new contract negotiated with CSPU. This contention fails for three reasons. First, settled law establishes that an employer should not bargain with a union respecting certain employees while a question is pending before the Board as to whether that union represents those employees. See, *e.g.*, *National Labor Relations Board* v. *National Container Corp.*, 211 F. 2d 525, 536 (C.A. 2); *Elastic Stop Nut Corp.* v. *National Labor Relations Board*, 142 F. 2d 371, 380 (C.A. 8), certiorari denied, 323 U.S. 722; *National Labor Relations Board* v. *Crowley's Milk Co.*, 208 F. 2d 444, 446 (C.A. 3); *Hoover Co.* v. *National Labor Relations Board*, 191 F. 2d 380, 386 (C.A. 6).* Second, the Company preserved the very "neutrality" peti-

* The recent decision of the Seventh Circuit in *St. Louis Independent Packing Co.* v. *National Labor Relations Board*, 48 LRRM 2469, on which petitioners rely (Pet. 11–12), is in accord with this settled law. To be sure, the court there held that the employer did not have to "hold back" until he was satisfied that a "real question" was presented, and this point was not reached until the Board had directed an election on a pending petition. However, Local 483 is in no position to argue that its representation petition filed with the Board did not raise a "real question" concerning representation. In any event, even if the Company should have waited until the election was directed before excepting the boilermaker employees from the negotiations with CSPU, no prejudice resulted from its premature action for the first denial of job bids by boilermakers did not occur until well after the Board election (pp. 8, 10, *supra*).

tioners demand (Pet. 12) when it permitted boilermakers to bump into the labor pool during the pendency of the representation proceeding and until the Board's certification of the boilermaker's unit.[5] Third, whatever contractual arrangement the Company might have made with respect to the right of boilermakers to participate in the O & M unit labor pool during the pendency of the representation proceeding would necessarily terminate when the boilermakers formally left that unit and formed their own, i.e., when the Board certification issued. It should also be noted that the evidence in this case does not suggest, nor do the petitioners contend, that the Company's refusal to bargain with CSPU respecting the boilermaker employees was motivated by a desire for reprisal against them for seeking craft severance.

3. On no firmer footing is petitioners' further contention (Pet. 13–17) that, if the Company and CSPU could exclude the boilermakers from their new contract, the most that they could do was to define the exclusion in terms of jobs rather than in terms of those eligible to vote in the craft severance election. It was Local 483 that persuaded the Board that the boilermaker unit should consist not only of those employees who were then doing boilermaker work but also those boilermakers who were then temporarily in the labor pool of the O & M unit. As a result, because

[5] During this period, however, the Company did not permit bidding out of the boilermakers group, for such activity (as contrasted with mere bumping into the labor pool on a temporary basis) would have altered the composition of the unit during the pendency of the representation proceeding.

of the necessity of the Company's maintaining neutrality vis-a-vis persons involved in a craft severance election, CSPU could not bargain with the Company on behalf of any of the boilermakers. And yet Local 483 would now have employees for whom CSPU was not permitted to bargain become the beneficiaries of the CSPU agreement—at the expense, indeed, of CSPU members for whom that union *was* bargaining.[6] Petitioners suggest no basis in either reason or precedent for thus turning bargaining procedures and representation responsibilities upside down and thereby making even more complicated "the difficult situations which often arise when craft severance requires readjustment of a highly complex seniority system" (Pet. A4).

4. In summary, the right of craft severance which petitioner successfully espoused in this proceeding necessarily encompasses a choice between the benefits of craft and those of industrial organization. Having chosen the former, the boilermakers in this case sacrificed the latter. Local 483, having successfully urged that the boilermakers temporarily in the O & M labor pool were eligible to vote as boilermakers in the severance election, cannot complain because, following the severance of the boilermakers from the O & M unit, the labor pool jobs were filled by employees remaining in that unit.

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[6] The benefits in question—being able to bid for, or temporarily to bump into, jobs elsewhere in the O & M unit—necessarily operate in derogation of the interests of other less senior members of the O & M unit, substantially all of whom (except for the boilermakers) are represented by CSPU.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 240

IN THE

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OCTOBER TERM, 1961

LOCAL 483, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS & HELPERS OF AMERICA, AFL-CIO, RALPH SCHOEN, ET AL.,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*,
and
STANDARD OIL COMPANY,
and
CENTRAL STATES PETROLEUM UNION, LOCAL 115,
Intervenors.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONERS TO BRIEF IN OPPOSITION

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OCTOBER TERM, 1961

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LOCAL 483, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS FORGERS & HELPERS OF AMERICA, AFL-CIO, RALPH SCHOENWEIS, ET AL., *Petitioners*,

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NATIONAL LABOR RELATIONS BOARD, *Respondent*,
and
STANDARD OIL COMPANY,
and
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REPLY BRIEF FOR PETITIONERS TO BRIEF IN OPPOSITION

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1. The Board's attempt (Op. p. 16, n. 4), to explain away as non-prejudicial the conflict with *St. Louis Independent Packing Co.*, is misleading. The May 3, 1957, contract was entered into three and a half months

before the Board directed an election (Op. 7, 5). If boilermakers had not been excluded from that contract there would have been no basis for denying them "bidding" privileges before, and ousting them from labor pool jobs after, Local 483 was certified (Op. 11-12). If boilermakers had been included subject to termination in the event Local 483 was certified, the provision for termination would have been unlawful for the reason stated by the Seventh Circuit (Pet. 12). The difference between that and postponing the effect of exclusion by a "gentlemen's agreement" is one of "verbal ritual" on which "[s]ubstantive rights and duties in the field of labor management do not depend." *NLRB* v. *Rockaway News Supply Co.*, 345 U.S. 71, 75.

2. Refusal to distinguish between CSPU's exercise of power to oust boilermakers from labor pool jobs and CSPU's lack of authority to control future transfers to and from jobs in the boilermaker unit newly created by the certification is not a consequence of any complexity in the seniority system, but of a basic misconception of the significance of *Howard, Radio Officers* and *Machinists*. The rationale of those cases is that an exclusive bargaining agent is forbidden ever to use a "discriminatory bargaining device" against "other workers," whether it represents them or not. 343 U.S., at 774-775. Of course, denial of job opportunities and other disparities resulting from the agent's lack of authority over terms and conditions of employment in jobs outside its unit are not products of discriminatory bargaining. It is certainly true, therefore, that "Nothing in [*Howard*] implies that the employees in the porters' unit had a right to jobs in the trainmen's unit in the event of a porter's layoff" (Op. 15). By the same token, nothing in petitioners' position implies that

boilermakers laid off from boilermaker jobs after the certification would have a right to "bump" into the CSPU unit. But loss of power over severed jobs does not license discriminatory exercise of power which the agent retains. If ouster of "porters" to make room for "brakemen" was the product of a "lawless invasion [ ]" (343 U.S., at 774), then *a fortiori* ouster of boilermakers to make room for non-boilermakers was too. There is irony in the Board's attempt to escape the conflict with *Howard* by implying (Op. 15), that the ban against discrimination based on race is somehow more rigid than the ban against discrimination based on protected union activity.

3. Time and again the Board says (Op. 15-16, n. 4, 17-18), that Local 483 should be barred from complaining because if it had not filed the petition and induced the Board to follow its usual practice of holding temporarily laid off employees eligible to vote the discrimination would not have occurred. But if Local 483 had a right to do this it is difficult to understand by what authority the Board presumes to withhold protection from its exercise. In any event, the rights involved are "personal rights" (*Shelly* v. *Kraemer*, 334 U.S. 1, 22; *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793, 798, 805), and the individual petitioners, at least, cannot be barred.

The Board's adoption of the CSPU-Standard contention (cf. Op. 14 with Pet. 7), that the individual petitioners are not entitled to complain because if they had not voted for Local 483 they would not have been ousted from their jobs highlights the need for certiorari. It was to prevent employers and unions from

posing precisely such dilemmas to employees that Congress guaranteed protection against discrimination. The Board's denial that the question is important (Op. 13), should be judged against its non-denial that the effect of treating this manufactured dilemma as an incident of choice between craft and industrial unionism (Op. 18), is to empower opponents of severance to defeat it.

Respectfully submitted,

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